



Mudanya v Hiddig Hotels Nairobi Company Limited (Employment and Labour Relations Cause E518 of 2020) [2024] KEELRC 1654 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1654 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E518 OF 2020**

MN NDUMA, J

JUNE 27, 2024

BETWEEN

GEOFFREY CHUNGULI MUDANYA CLAIMANT

AND

HIDDIG HOTELS NAIROBI COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant filed suit on 18th September 2020 against the respondent seeking the following reliefs:-
 1. Terminal dues in the sum of Kshs 3,106,163/= made up of:
 - a. Unpaid salary for the months of April, May and June 2020 in the sum of Kshs 300,000/=
 - b. One month salary *in lieu* of notice
 - c. ½ month salary for July 2020 Kshs 50,000/=
 - d. Unpaid leave for 26 days Kshs 100,000/=
 - e. Leave travel allowance Kshs 20,000/=
 - f. Under payment in October 2019 Kshs 39,497.00
 - g. Extra token as per termination letter Kshs 30,000/=
 - h. Accrued overtime pay Kshs 656,666.10 and general damages compensation
 - i. Equivalent of 12 months' salary in compensation for the unlawful termination and
 - j. 6 month salary for the unserved contract Kshs 600,000/=
 - k. Costs and interest



Response

2. The respondent filed an amended statement of response and counter claim dated 1st December 2021 in which the respondent admits having employed the claimant at a gross salary of Kshs 70,000/= per month and alleges that Kshs 30,000/= over and above the gross salary was not contractually agreed but was discretionally.
3. The respondent avers that the separation with the claimant was mutual due to the closure of hotels during Covid 19 pandemic and the letter dated 13/7/2020 sent to the claimant on 14/7/2020 was a continuation of discussions for mutual separation by terminating the contract.
4. That termination was in terms of the contract on one month notice. That claimant was not under paid and was given accommodation by the respondent.
5. The respondent counter claims that in terms of the fixed term contract of employment dated 1/10/2019, the claimant as the general manager was bound not to disclose any confidential information that come to his possession by virtue of his work.
6. That upon termination the claimant was required to return all property that was generated or obtained during his employment including all documents, hand book, account ledgers, financial documents, manuals, computer software, keys and security card.
7. That the claimant communicated the said confidential information despite at the material time being under a fiduciary duty of care, trust and confidence which he breached.

Particulars of breach

- a. Failure to return the respondent's financial record, documents, handbook that came to his possession during the course of his employment.
- b. Disclosing the respondent's financial records, documents, handbooks, ledgers and rolls that came to his possession during the course of his employment in the suit herein thereby making them public record without the authority of the respondent.
8. That the disclosure was a breach of confidentiality which exposed the respondent's internal confidential information to unauthorized third parties. That the respondent seeks redress from the claimant by way of general damages for breach of confidence, interest and costs.
9. CW1 the claimant testified under oath and adopted the witness statement dated 3rd September 2020 as his evidence in chief. CW1 testified that he was employed as a general manger at the hotels of the respondent located in Garissa Town at a monthly salary of Kshs 70,000/= That despite the one-year contract stating the salary to be Kshs 70,000/= the claimant was paid a monthly salary of Kshs 100,000/=.
10. The claimant wrote a letter dated 15/10/2019 to the respondent seeking clarification. The claimant noted that his salary was indeed Kshs 100,000/= and not Kshs 70,000/=. That the net pay was Kshs 77,403/= upon deduction of statutory due in the sum of Kshs 22,597/=.
11. The claimant requested to be added house allowance in the said letter. The claimant produced bundle of documents, including a copy of his bank statement and p9 form as his evidence in chief. The contract was to end on 30th September 2020 and was subject to six (6) months' probation. That the contract was renewable.



12. The claimant states that he worked diligently until 8/7/2020 when the respondent's directors called the claimant and asked him to attend a meeting on 14/7/2020 at the head office of the respondent. That the alleged purpose of the meeting was to strategize and plan the respondent's business.
13. However, on 14/7/2020, the claimant received a telephone call from the respondent's director who informed the claimant that his employment had been terminated and that he would be paid his terminal dues. The meeting did not take place as planned.
14. The claimant received a letter dated 14/8/2020 confirming the termination. The letter was dated 13/7/2020. The termination was said to be on grounds of redundancy because the hotel industry had been adversely affected by the COVID -19 pandemic leading to reduced business and it had become difficult for the respondent to pay its employees. The letter of termination was produced by the claimant.
15. That CW1 testified that the termination violated the requirements of section 40 of the [Employment Act](#), 2007 in that no notice was given to him or to the labour office giving at least one-month notice of termination.
16. Furthermore, as the general manager the claimant was aware that the information about reduced business was false since the hotel continued operating as usual since they relied mostly on local clientele. The claimant produced a copy of respondent's performance charts for the months of November 2019; February 2020; and March 2020 and respondent's sales and collections summaries for the month of April 2020, May 2020 and June 2020 to show that respondent's business remained comparatively unaffected. The documents were produced by the claimant before court.
17. The claimant said that he was from the start discriminated against by the respondent on grounds of tribe race and religion. That since being a general manager, he was paid less for equal work done compared to other supervisors employed by the respondent including having employees below the rank of general manger earning more than the claimant. The claimant produced a copy of his letter to the respondent dated 23/11/2019, addressing the issue.
18. That he was the only employee terminated under the guise of alleged adverse effects of Covid-19 pandemic on the hotel industry while other employees continued in employment to date.
19. Thirdly, CW1 said he was the only employee not getting house allowance which was provided to all other employees of the respondent despite providing leadership and oversight for two hotels being Hiddig Executive Hotel (New) on Posta Road and Hiddig Hotel (old) on Miraa Road. The claimant produced payroll for the months of October 2020 and November 2020.
The claimant prays to be awarded accordingly.
20. The claimant was cross-examined by Mr. Itemere Advocate for the respondent and he confirmed that his agreed monthly salary was Kshs 100,000/=. Though the contract stated the salary was Kshs 70,000/= CW1 said he was told that statutory deduction will be at source from the gross salary of Kshs 100,000/=. That he had discussed the matter with the respondent and was told Kshs 70,000/= was net upon deduction of taxes which would be paid separately. CW1 said he wrote to the respondent about the matter on 15/10/2019 and was told verbally that the matter would be clarified. CW1 said he claims underpayment for the time before November 2019 since the salary was realigned from November 2019 to Kshs 100,000/=. CW1 said arrear salary in this respect is Kshs 39,497/- over the period November 2019 to March 2020, which is a sum of Kshs 10,000/= over a five-month period. That this was an oversight from the head office. CW1 said he was informed that he should have been paid Kshs 77,000/= and not Kshs 75,000/=.



21. The claimant said he was aware of the directions by the Ministry of Labour during Covid-19 period in March 2020. CW1 however said the hotels were not affected by Covid-19. That they had strategy to mitigate the effects of Covid-19.
22. CW1 said the letter of termination provided reasons for termination and that he was paid Kshs 100,000/= in lieu of notice and Kshs 30,000/= gratuity. The claimant said he did not receive salary for April, May and June. That the last salary was in March 2020. That the claimant did not receive any written communication about the non-payment. The director told the claimant verbally that he was sorting out the salary issues.
23. CW1 said his four (4) staff were paid higher salary than him and got house allowance. That they had no written contracts. CW1 said as General Manager he was aware of the terms and conditions of service because he prepared the payroll at the end of the month. That the cook and accountant earned more than him. That the accountant Abdi was related to the owner of the hotel. CW1 said he allocated responsibilities to them but they earned more than him. CW1 said he organized the menu and events for the cook to implement. That he gave over all directions on operations at the hotels.
24. CW1 said he did not take leave for the period served. That he was entitled to 26 days leave per year and claims Kshs 100,000/= in respect thereof.
25. That in July 2020 he was paid $\frac{1}{2}$ salary because letter of termination was dated 13/7/2020. That he worked from April, May and June 2020, by reporting at the head office at Nairobi. That during that period he was called from time to time to provide information. That he was deemed to be working. That he was not in Garissa. That he did online work, looked at reports and reported back. That people worked from home then. The hotel was still running. He produced business performance charges for the period. CW1 said the charts were reports generated by accounts department. They then are system generated. That the meeting of 28/3/2020 was scheduled at Garissa but claimant said he was told to wait at Nairobi until he was called. That Retired General Mohammed is the chairman of the hotels. That claimant, was then informed that his employment had been terminated and was given a final cheque of Kshs 100,000/=. That there was nothing in writing on any measures to be taken prior to the termination but there were ongoing discussions on strategies to mitigate Covid-19 pandemic. That between April and June 2020, he remained at home but his employment had not been terminated. The director who summoned the claimant to Nairobi was one Abdi Omar.
26. The claimant denied that he absconded duty. That other employees earned Kshs 113,000/=; 106,000 and 125,000/= respectively and then remained in employment. That redundancy procedure was not followed.

Defence

27. RW1 Hussein Warsame Mohammed testified that he was a director of the respondent. That the hotels are at Nairobi and Garissa. RW1 adopted a witness statement dated 1/12/2021 as his evidence in chief. RW1 said the claimant was employed vide a one year fixed term contract commencing on 1/10/2019 to 31/09/2020. That the contractual remuneration was Kshs 70,000/= per month but a few months after commencement of the contract the respondent started paying the claimant Kshs 100,000/=. That the decision was not contractually binding and same was reached to motivate the claimant to perform better as other employees were also motivated and in recognition of the claimant's effort which include travelling to Garissa for work.
28. That the claimant was provided with accommodation. The contract was terminable by issuance of one-month notice.



29. That the claimant was obliged not to disclose confidential information of the respondent to third parties.
30. That Covid-19 affected the hotel industry hard including the respondent. That they experienced instant shut down and revenue reduction due to lack of customers.
31. It was difficult to maintain all the staff hence the need to scale down operations to provide cushion during the pandemic. The respondent laid off some of its staff as a result including the claimant to reduce the payroll and costs of running business.
32. That during this period some of the employees including the claimant were not undertaking any tasks since restaurants and hotel business were shut down.
33. The respondent issued the claimant a termination notice effective immediately and paid the claimant one months' salary in lieu of notice in the sum of Kshs 100,000/= and a token of Kshs 30,000/= as appreciation for the claimant's services.
34. That the claimant has disclosed confidential information in this suit. The respondent claims general damages for the unlawful breach of confidence.

Determination

35. The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW1 and RW1. The issues for determination are: -

- a. Whether the termination of employment of claimant was for a valid reason following a fair procedure.
- b. Whether the claimant is entitled to the reliefs sought

Section 2 of the *Employment Act*, 2007 defines redundancy as follows: -

Redundancy means the loss of employment, occupation job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

36. Once a redundancy situation arises, the employee is mandated to follow the procedure set out under section 40 of *the Act* which provides as follows: -

- (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—
 - (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
 - (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
 - (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;



- (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
- (e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
- (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
- (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.

37. The facts of this case which are not in dispute is that the termination of employment of the claimant took place by a letter dated 13/7/2020.
38. In the said letter the respondent gave the reason(s) for termination to be an adverse effect on the hotel industry by Covid-19 pandemic.
39. It is not in dispute that restaurants were shut down during the Covid-19 period. During the time material to this dispute, it is common cause that the claimant and other staff were sent home in the month of April, May and June because the restaurants had been shut down. It is also true that the hotels that provided accommodation like the ones owned by the respondents continued to operate but at a much lower scale over all due to the various restrictions imposed by the government to stem the spread of Covid-19 pandemic. Indeed the court takes judicial notice of the happening of Covid-19 and the co-operative measures taken by stake holders to minimise and/or contain the effects of Covid-19. It was a scary moment and no one knew how the Covid-19 pandemic would impact, the entire world community at the time.
40. The court notes that the claimant had recently been employed by the respondent by a written one year fixed contract effective 1st October 2019 and was due to end on 30th September 2020. It is also not in dispute that the claimant was appointed in the position of general manger at a stated salary of Kshs 70,000/= . The respondent paid the claimant Kshs 100,000/= gross salary with effect from November 2019 in order to motivate the claimant in the words of RW1.
41. There is no evidence before court as to when the other three counterparts of the claimant including the cook and the accountant were employed by the respondent but the court got the impression that the junior staff who reported to the general manger were employed by the respondent before the claimant. Testimony by the claimant indicated that the other three employees earned Kshs 113,000/=; 106,000/= and, 125,000/= respectively which sums in the court's finding were not drastically different from the salary of Kshs 100,000/= which was paid to the claimant. The above sums would have been affected by the job description of the accountant and the cook and the period of time they had served the respondent. The court does not know the designation of the third member of staff.
42. In the whole the claimant has not adduced sufficient evidence to demonstrate that he was paid less for work of equal value on grounds of race or descent.
43. The onus of prove of that issue of discrimination was on the claimant in terms of section 107 and 108 of the *Evidence Act* Cap 80 Laws of Kenya and the claimant failed in that respect.
44. The court is satisfied by the evidence adduced by the respondent that there was need to scale down the operations of the respondent due to the down turn of business caused by Covid – 19 Pandemic.



- The fact that there was no need for a period of upto three months between April to June 2020 for the claimant to report daily to work and or perform continuous work is enough evidence to demonstrate that there was a valid operational reason to reduce the number of staff of the respondent to reduce the wage bill and operational costs.
45. The respondent however, failed completely to follow the procedure set out under section 40 of the *Employment Act*, 2007 to first issue a one-month notice to the claimant and the labour office of the intention to retrench the staff including the claimant.
 46. The respondent also failed to engage the claimant in terms of section 40(1)(c) to discuss the selection criteria applied in reducing the number of staff and to provide reasons to the claimant why he was the choice for termination on grounds of redundancy and not the others.
 47. The respondent did not also calculate and pay the claimant in lieu of leave days not taken in terms of section 40(1)(e) of *the Act*.
 48. The respondent only paid one-month salary *in lieu* of notice and a token of Kshs 30,000/= not attributed to any mandatory item payable upon retrenchment.
 49. Accordingly, the respondent failed the procedural test in implementing termination of the claimant on grounds of redundancy. The claimant is entitled to compensation for that failure in terms of section 49(1)(c) and (4) of the Act. In this respect, the claimant had only served from 1st October 2019 to 13th July 2020, a period of 8 ½ months. The claimant was left with about 2 ½ months to the end of the one-year contract that was to end on 30th September 2020. The extension of the contract was discretionary and cannot form the basis of legitimate expectation by the claimant that he would continue serving the respondent thereafter.
 50. The evidence before court is that the contract of employment between the claimant and respondent was in place from 1st October 2019 up to 13th July 2020. The respondent is under obligation to pay the claimant the full salary for the entire period. The claimant has proved that he was not paid salary for the month of April, May and June 2020 in the sum of Kshs 100,000/= per month. The court awards the claimant Kshs 300,000/= in respect thereof. The under payment of Kshs 10,000/= per month was proved and is granted.
 51. The court is satisfied that the claimant was paid Kshs 100,000/= in lieu of one-month notice and this claim has no merit and is dismissed.
 52. The court is also satisfied that the respondent did not pay the claimant ½ month salary up to 13th July 2020 in the sum of Kshs 50,000/=. The court awards the claimant accordingly.
 53. Furthermore, the court is satisfied that the claimant had earned his full leave having served the respondent for a period of over 8 months. The court awards the claimant Kshs 100,000/= *in lieu* of 26 days leave not taken. The claim for leave travel allowance lacks merit since no leave was taken by the claimant.
 54. With respect to the claim for under payment in the month of October 2019, the claimant has failed to prove that he was entitled to earn Kshs 100,000/= from the 1st day of the contract since the contract expressly provide for a gross monthly salary of Kshs 70,000/=. It was within the right of the respondent to increase the salary of the claimant as it did from the month of November 2019. The claim for underpayment in the sum of Kshs 39,497/= for October 2019 lacks merit and is dismissed.
 55. The claimant having been declared redundant for a valid reason has no right to claim damages in respect of the unserved tem of about 2 ½ months instead the court has considered all the above factors



including that he did not contribute to the termination and was not paid his terminal benefits and the short period he had served the respondent together with the Supreme Court decision in *Kenfriegt East Africa Ltd v Benson K. Ngut*, 2019

56. Guided by the above analysis we find that once a court has reached a finding that an employer has unlawfully terminated an employee's employment the appropriate remedy is the one provided under section 49 of the *Employment Act*. We also need to clarify that a payment of an award in section 40(1) (a) is different from an award under section 49(1)(b) and (c) Section 49 allows an award to include any or all of the listed remedies provided that a court in making the award exercises its discretion judiciously and is guided by section 49(4)(m)."

and award the claimant the equivalent of two months' salary in compensation for the un-procedural termination on grounds of redundancy in the sum of Kshs 200,000/=.

57. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:

- a. Kshs 200,000/= in compensation
- b. Kshs 350,000/= arrear salary for the month of April, May and June upto 17th July 2020.
- c. Kshs 100,000/= in lieu of 26 leave days not taken.
- d. Kshs 10,000/= underpayment for 5 months
Total award Kshs 600,060/=
- e. Interest at court rates from date of judgment till payment in full.
- f. Costs of the suit

58. For the avoidance of doubt the court find that the notice pay and token were duly paid to the claimant and so are not awarded.

DATED AT NAIROBI THIS 27TH DAY OF JUNE, 2024.

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Inyangu for the claimant

Mr. Itemele for respondent

Mr. Kemboi, Court Assistant

